

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON BERNARD BELL,

Defendant-Appellant.

UNPUBLISHED

July 27, 2010

No. 290691

Kent Circuit Court

LC No. 08-011337-FC

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction for two counts of armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 9 to 30 years' imprisonment each armed robbery conviction and to two years' imprisonment for each felony-firearm conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

On June 13, 2008 at approximately 2:00 a.m., Marvin James and Kerron Duncan went to the Chicken Coop in Grand Rapids, Michigan. While waiting in line, the two got into a verbal altercation with defendant and Robert Echols.¹ Following the verbal altercation, as James and Duncan exited the Chicken Coop, defendant and Echols displayed handguns. According to testimony presented at trial, as James was heading toward his car, he placed his hand in his pocket to access his handgun.² When Duncan tried to open the passenger's door, defendant grabbed at his pocket and both defendant and Echols had their handguns pointed at James and Duncan. While defendant pointed his handgun at James and Duncan, Echols took James' handgun and took necklaces from James and Duncan.

The entire incident was captured on the video surveillance of the Chicken Coop. At trial, the prosecution introduced still shots from the surveillance system and played the video

¹ Echols died on October 27, 2008.

² James has a concealed weapons permit and was carrying a handgun at the time of the incident.

recording from the surveillance system. Both the still shots and video recording systems clearly depicted defendant pointing a handgun at the victims.

On July 19, 2008, James and Duncan were at a nightclub in Grand Rapids where they saw defendant and Echols, defendant was wearing Duncan's necklace. They telephoned the police, informing them that the individuals who had robbed them a month earlier were in the nightclub. Officers McClimans and Bush responded to the call and waited for defendant and Echols to exit the nightclub and leave, then stopped their vehicle. During the stop, McClimans took a photograph of defendant and Officer Bush. Finding no contraband, the officers released defendant and Echols.³ Later, James and Duncan identified defendant in a photographic lineup as one of the robbers. He was charged with two counts each of armed robbery and felony firearm. The jury found defendant guilty on all counts, and this appeal ensued.

Defendant first challenges the sufficiency of the evidence to sustain his armed robbery convictions. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

The offense of armed robbery includes: “(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The elements of aiding and abetting include: (1) the offense charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement to assist the commission of the offense; and (3) the defendant intended to commit the offense or had knowledge that the principal intended its commission at the time the defendant gave aid and encouragement. *Id.* at 768.

On appeal, defendant does not challenge any particular element of the charged offense, but rather asserts that the video recording of the Chicken Coop's surveillance system admitted at trial does not support the victims' testimony that defendant pointed a gun at them during the robbery. As previously stated, the video recording clearly depicted defendant with a handgun in his right hand. While the view was blocked to a certain extent, it was reasonably clear that defendant pointed his handgun at one victim during the armed robbery. Further, a photograph admitted at trial depicted defendant pointing his handgun at the other victim. The video recording does not clearly show that defendant or coconspirator Robert Echols removed any property from the victims; however, both defendant and Echols were in very close proximity with the victims in the Chicken Coop's parking lot. Additionally, the video recording depicted Echols either frisking or reaching towards the victims' bodies at various points. Notably, the victims testified that defendant and Echols pointed handguns at the victims. While defendant pointed his handgun at the victims, Echols took a handgun and two necklaces from the victims.

³ It is not entirely clear from the record why the officers did not arrest defendant at this juncture, except for testimony offered by Officer Needham who stated that James was not sure if Echols was the other person involved in the robbery the night he called the police.

One victim testified that during the armed robbery, defendant repeatedly stated “[t]hat’s how we do it in Chi-town.” When the police photographed defendant on July 19, 2008, he was wearing one of the victim’s necklaces. It was for the jury, as factfinder, to determine the weight of the evidence and credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

In this case, the elements of armed robbery were satisfied, where it was undisputed that Echols committed an assault on the victims by using his handgun to take their property. *Carines*, 460 Mich at 757. On appeal, defendant claims that he put his handgun away, and merely observed Echols rob the victims. However, the record directly refutes defendant’s claim. The trial testimony, video recording, and photographs demonstrate that defendant performed acts to assist Echols in the armed robbery, namely, defendant used a handgun to assist in facilitating the armed robbery. The evidence supports that defendant was aware of Echols’ intent to commit armed robbery at the time defendant gave assistance. “An aider and abettor’s state of mind may be inferred from all the facts and circumstances.” *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615 (2001). “Factors that may be considered include a close association between the defendant and the principal, the defendant’s participation in the planning or execution of the crime, and evidence of flight after the crime.” *Mass*, 464 Mich at 569. Here, defendant threatened the victims inside the Chicken Coop by stating that he would put a hole in their heads. As noted previously, he clearly participated in the execution of the armed robbery. We defer to the jury’s credibility determinations and any conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that all of the elements of armed robbery under an aiding and abetting theory were proved beyond a reasonable doubt. *McGhee*, 268 Mich App at 622; *Carines*, 460 Mich at 757, 768.

Defendant, in his standard 4 brief, also challenges the sufficiency of the evidence, as well as advancing a defense of actual innocence. Defendant’s challenges lack merit. As previously stated, the evidence admitted at trial coupled with the testimony of the victims was more than sufficient evidence to sustain defendant’s armed robbery convictions under an aiding and abetting theory. Contrary to defendant’s assertions, the record is devoid of any evidence that defendant was merely a spectator, or that he was innocent.

Next, defendant asserts that the trial court should have sua sponte issued a jury instruction on receiving and concealing stolen property, MCL 750.535, or alternately, that defense counsel rendered ineffective assistance of counsel for failing to request such an instruction. We conclude that the allegation of instruction error is waived, because defense counsel expressed satisfaction with the trial court’s jury instructions. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Moreover, defendant’s allegation of instructional error lacks merit, because the trial court was not required to sua sponte instruct the jury on the uncharged offense of receiving or concealing stolen property.

A trial court’s jury instructions must include all of the elements of the charged offense, and must not exclude any material issues, defenses, or theories, which are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). This Court “examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant’s rights by fairly

presenting to the jury the issues to be tried.” *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

A trial court is generally under no obligation to issue a jury instruction on lesser-included offenses. *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). Moreover, receiving and concealing stolen property is not a necessarily included lesser offense or even a cognate lesser offense of the charged offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994); MCL 777.16y; MCL 777.16z; *People v Jackson*, 158 Mich App 544, 558-559; 405 NW2d 192 (1987). We reject defendant’s argument that the trial court should have issued sua sponte a jury instruction on the offense of receiving or concealing stolen property, and we find that the trial court’s jury instructions included all of the elements of the charged offense; they did not exclude any material issues, defenses, or theories as supported by the evidence. *Canales*, 243 Mich App at 574. Accordingly, defendant has failed to establish error and certainly has not established plain error. *Carines*, 460 Mich at 766-767, 772-773.

Defendant also asserts that defense counsel was ineffective for not requesting an instruction on receiving or concealing stolen property. To sustain a claim of ineffective assistance of counsel, a defendant must prove that defense counsel’s “performance was deficient” and that deficiency “prejudiced the defense.” *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Decisions regarding what instructions to request are left to defense counsel’s discretion as a matter of trial strategy, and we will not second-guess such decisions. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003); *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999). The trial court’s jury instructions included all of the elements of the charged offense, and they did not exclude any material issues, defenses, or theories as supported by the evidence. *Canales*, 243 Mich App at 574. Moreover, as discussed previously, there is no indication that defendant was entitled to a jury instruction on an uncharged offense. It is well settled that counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant also raises seven unpreserved issues in a standard 4 brief. We generally review unpreserved allegations for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

First, defendant essentially argues that he should have been charged with the offense of aiding and abetting rather than armed robbery. Defendant’s argument is based on a faulty legal premise as aiding and abetting is not a separate, substantive offense, but is simply a theory of prosecution, which permits the imposition of vicarious liability for accomplices. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). “[D]efendant may be charged as a principal but convicted as an aider and abettor.” *Turner*, 213 Mich App at 568. Accordingly, there was no error in charging defendant with the offense of armed robbery.

Second, defendant asserts that the photographic array was unduly suggestive and he was deprived of counsel during the photographic line-up. The need to review whether an independent source exists to support in-court identification testimony arises only when there is evidence that the lineup procedures used were unduly suggestive. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Given that no evidence of an unduly suggestive photographic lineup occurred in this case, we find no manifest injustice will result from our failure to review the issue. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Moreover,

contrary to defendant's assertion on appeal, he was not entitled to counsel at this stage of the proceedings. *Kurylczyk*, 443 Mich at 301-302. Notably, there is no evidence that defendant was in custody when James and Duncan viewed the photographic lineups. "In the case of photographic identifications, the right of counsel attaches with custody." *Id.* at 302.

In reaching our conclusion, we also reject defendant's claim that the victims' identification of him was based solely on seeing defendant wearing one of the stolen necklaces. "Identity may be shown by either direct testimony or circumstantial evidence," *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). In this case, the victims unequivocally identified defendant as one of the robbers at trial, and they identified him in separate photographic lineups. Even assuming a tainted photographic line-up, the jury viewed the video recording and still-shot photographs taken the night of the robbery, as well as the photograph of defendant taken on July 19, 2008 to establish defendant's identity as a perpetrator. We defer to the jury's credibility decisions regarding witness identification testimony. *People v Edwards*, 55 Mich App 256, 259-260; 222 NW2d 203 (1974).

Third, defendant claims that he was denied discovery when the prosecutor failed to produce one of the stolen necklaces at trial. This claim lacks merit. "Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). To establish a discovery violation, the defendant must demonstrate: "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

Defendant failed to establish any of the aforementioned elements for a discovery violation, where there was no indication that the prosecution possessed the necklace, there was a reasonable probability that defendant possessed or disposed of the necklace, there was no indication that the prosecution suppressed the evidence, and there was no reasonable probability that the outcome of the proceedings would have been different if the necklace was produced. In his standard 4 brief, defendant contends that the necklace was critical, because the victims' identifications were based merely on the fact that he was wearing that necklace. However, as discussed previously, that contention lacks merit, because the victims' identifications of defendant were unequivocal. Defendant also suggests that there was no proof of ownership of the necklace. However, proof of ownership is not an element to the offense of armed robbery. See *Carines*, 460 Mich at 757. Further, the record undermines defendant's position, where the victim testified about when he first purchased the necklace and its cost, and the prosecution admitted a photograph of the victim wearing the necklace. Ultimately, there is no indication that the prosecution improperly suppressed exculpatory evidence in this case. *People v Tracey*, 221 Mich App 321, 324-325; 561 NW2d 133 (1997). Defendant failed to establish plain error affecting his substantial rights regarding this purported discovery violation. *Carines*, 460 Mich at 763-764.

Fourth, defendant presents a fair-cross-section challenge related to his jury but wrongly relies on *Batson*⁴ legal principles to support his argument. Based on our thorough review of the record, we conclude that even a generous reading of this issue provides no relief for defendant. Here, he failed to set forth a prima facie violation of the fair-cross-section requirement, where there is no indication that African-Americans were underrepresented in the venire or jury pool, and that underrepresentation was the result of systematic exclusion. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); *People v Hubbard (After Remand)*, 217 Mich App 459, 474, 481; 552 NW2d 493 (1996). Further, the trial court did not err in determining that the prosecutor dismissed an African-American juror for credible and race neutral reasons. *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2005).

Fifth, defendant complains that the prosecutor engaged in misconduct by (1) charging defendant on an inapplicable charge of armed robbery where defendant did not take anything from the victims, (2) using a tainted process in obtaining an identification, (3) denying defendant discovery, (4) denying defendant a fair cross section of jurors, (5) preventing defendant from proving his actual innocence, and (6) making improper remarks. This Court reviews claims of prosecutorial misconduct on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009).

The first four complaints lack merit for the reasons previously discussed. Defendant’s accusations toward the prosecutor’s office are best described as assertions without any factual basis. There was no evidence presented at trial or by defendant that would lead us to conclude that anyone in the Kent County prosecutor’s office engaged in any manner of prosecutorial misconduct. With respect to whether the prosecutor engaged in misconduct by preventing defendant from proving his actual innocence, the jury ultimately rejected the defense theory. There is no indication that the prosecution improperly denigrated the defense, see *People v Bahoda*, 448 Mich 261, 283, 293; 531 NW2d 659 (1995), or improperly shifted the burden of proof onto defendant. See *McGhee*, 268 Mich App at 635. With respect to whether the prosecutor engaged in misconduct by arguing facts not in evidence or engaging in improper bolstering of the evidence, we find that the record refutes defendant’s claims. The prosecutor’s opening statement must generally provide a full and fair statement of the prosecutor’s case and the facts the prosecutor intends to prove. *People v Stimage*, 202 Mich App 28, 31; 507 NW2d 778 (1993). The prosecutor’s opening statement did precisely that. Further, the prosecutor did not improperly argue facts not in evidence during closing argument, but properly argued what the evidence proved and all reasonable inferences relating to her theory of the case. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part 477 Mich 856 (2006). There is no record support that the prosecutor engaged in any improper bolstering. In sum, none of defendant’s allegations of prosecutorial misconduct have merit, where there is no evidence that defendant was denied a fair and impartial trial. *Mesik*, 285 Mich App at 541.

⁴ *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

Sixth, defendant objects to several instances of bias on the part of the trial court, alleging that the trial court deprived him from having a fair cross section of the community serve on his jury; that the trial court improperly denied his *Batson* challenge; that the trial court's instruction regarding the evaluation of witnesses' testimony amounted to a blatant miscarriage of justice; and that the trial court demonstrated bias by failing to give a separate aiding and abetting jury instruction. "A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). A trial court's comments or conduct pierces the veil of judicial impartiality if they "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). In determining whether the challenged judicial remarks or conduct were improper, we consider whether the remarks or conduct were of such a nature as to have unduly influenced the jury, thereby depriving the defendant of his right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006).

As discussed previously, defendant failed to establish a prima facie violation of the fair-cross-section requirement, where there is no indication that African-Americans were underrepresented in the venire or jury pool, and that underrepresentation was the result of systematic exclusion. *Duren*, 439 US at 364. With respect to the *Batson* challenge, because the prosecutor's explanation was based on something other than the race of the juror, the trial court properly deemed the explanation as race neutral where no discriminatory intent was inherent in that explanation. *Knight*, 473 Mich at 337. Next, we conclude that it was not error to give the instruction on the evaluation of witnesses' testimony, where the trial court properly instructed the jury regarding the applicable law. *People v Knowles*, 15 Mich 408, 412 (1867); *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). Finally, contrary to defendant's objection, we find that the trial court provided appropriate jury instructions regarding armed robbery and aiding and abetting. *Carines*, 460 Mich at 757, 768. In sum, defendant failed to overcome the heavy presumption of judicial impartiality regarding his claims of judicial bias. *Wells*, 238 Mich App at 391.

Finally, defendant alleges that defense counsel rendered ineffective assistance of counsel for essentially failing to present a "valid and pertinent defense." The record demonstrates that defense counsel vigorously advocated that defendant was merely present and not a participant in the armed robbery, but that Echols acted alone. In his standard 4 brief, defendant does not state what other defenses should have been presented. In reviewing this claim of ineffective assistance of counsel, we will not substitute our judgment for that of counsel regarding trial strategy, and even if a strategy fails, it does not render counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 415-416; 639 NW2d 291 (2001). Defendant failed to overcome the strong presumption that defense counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens